RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
OCT 20 1998
CLERK

No. 98-43

In The
SUPREME COURT OF THE UNITED STATES
October Term 1997

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

DONELL AUSTIN,
Respondent.

MOTION FOR LEAVE TO FILE IN *FORMA PAUPERIS*

Now comes the respondent Donell Austin, by his attorney James Geis, contract attorney for the Office of the State Appellate Defender, and moves for leave to file his Brief in Opposition in *forma pauperis*.

In support thereof he states:

1. As stated in the attached affidavit: Respondent has been continually incarcerated since January 27, 1993; respondent has not received any income, other than prison wages, from employment or investments since that date; respondent has no cash, checking or savings accounts; and, respondent owns no income producing assets or valuable property.

2. Respondent was declared indigent in the Circuit Court of Cook County and represented by the Cook County Public Defender throughout the trial court proceedings in this case. After conviction and sentence was imposed in this case, the trial judge found

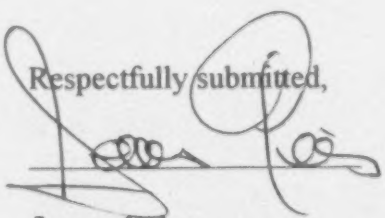
respondent remained indigent and ordered that a free transcript of the trial court proceedings be prepared and accordingly the court appointed the Office of the State Appellate Defender to represent respondent on appeal.

3. Respondent is currently represented by the Office of the State Appellate Defender, by contract attorney Mr. James Geis.

4. Respondent is financially unable to pay the printing costs necessary to file the Brief in Opposition in compliance with Supreme Court Rule 33(1).

WHEREFORE, respondent respectfully prays that this Honorable Court will grant this Motion for Leave to File in *Forma Pauperis*.

Respectfully submitted,



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Counsel for Respondent

*** Counsel of Record**

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERS

UNITED STATES SUPREME COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 98-43**
	)	
DONELL AUSTIN,	)	
	)	
Respondent,	)	

Affidavit in Support of Motion to Proceed in Forma Pauperis

I, Donell Austin being first duly sworn, depose and say that I am the respondent , in the above entitled case; that in support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of such proceedings or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? **NO. I AM PRESENTLY, AND HAVE BEEN SINCE JANUARY 27, 1993, INCARCERATED**

2. Have you received within the last twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? **NO**

3. Do you own any cash or checking or savings account? **NO**

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property? **NO**

5. List the persons who are dependent upon you for support and state your relationship to those persons. **NONE**

Donell Austin

Donell Austin
Register No. B-75784
Menard Correctional Center
Menard, Illinois 62259

SUBSCRIBED AND SWORN TO before me this 14th day of October, 1998

Notary Public

OFFICIAL SEAL
JAMES GEIS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 05/01/00

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On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

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Table of Contents

Table of Authorities ii

Question Presented for Review 2

Statement of the Case 2

Reasons Why the Petition Should be Denied:

First Question Presented:

(A) Certiorari should be denied because the decision below does not raise the Question Presented. 5

B) Certiorari should be denied because the appellate court's holding does not conflict with the holding in *United States ex. rel Wright* v. *Culyer*, 563 F.2d 627 (3rd Cir. 1977). 8

Second Question Presented:

(A) Certiorari should be denied because neither the decision below nor the record raises the Question Presented in the petition. 9

(B) Certiorari should be denied because the question of whether probable cause always precludes the sanction of exclusion was answered in *Taylor v. Alabama*, 457 U.S. 687, (1982). 10

C) Certiorari should be denied because there is no conflict of State or Federal authority on the question of whether after acquired probable cause always cures a Fourth Amendment violation. 12

(D) Certiorari should be denied because the Court has historically refused to apply a bright line rule, running in either direction, to determine if the exclusionary rule should be applied after a Fourth Amendment violation. 14

(E) Certiorari should be denied because rejection of the attenuation analysis that was used by the appellate court will undermine the purpose of the exclusionary rule. 15

Conclusion 16

Table of Authorities

Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961 (1969) 5

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975) 14, 15

Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1988) 10

New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640 (1989) 14

Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427 (1985) 10

People v Foskey (1990), 127 Ill. 2d 66, 554 N.E.2d 192 7

People v. O'Neil (1984), 104 Ill. 2d 399, 472 N.E.2d 441 10

State v. Gifford, 558 So.2d 444 (Fla. App. 1990) 12

Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664 (1982) 11

Townsley v. State, 652 S.W.2d 791 (Tex. Ct. Crim. App. 1983) 12

United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613 (1974) 6

United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985) 15

United States ex. rel Wright v. *Culyer,* 563 F.2d 627 (3rd Cir. 1977) 8, 12

Virgin Islands v. Gerau, 502 F.2d 914 (3rd Cir. 1974) 12

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963) 12

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Donell Austin, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Illinois Appellate Court's opinion in this case. That decision is reported at 293 Ill. App.3d, 688 N.E.2d 740 (1st Dist. 1997).

QUESTION PRESENTED FOR REVIEW

Whether the trial court's finding that respondent's statement was attenuated from the circumstances surrounding his illegal arrest was manifestly erroneous? [1]

STATEMENT OF THE CASE

The following pertinent facts are either unclear or omitted from the petition:

There were three rounds of interviews at the police station. During each interview the four men were interviewed in the same order. Kevin Taylor was first, Jamel Dorrough was second, Bobbie Walley was third, and the respondent was last. During the first round, nobody made a statement. During the second round, Taylor was the first person to make a statement implicating the other three men. When confronted with Taylor's

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[1] In the appellate court, in his opening brief, respondent stated the issue as a factual issue:

> The trial court's ruling that the effect of the illegal arrest was attenuated by two independent intervening events is manifestly erroneous because the underlying factors are not supported by the evidence. (Respondent's brief in the Illinois Appellate Court, p. iv).

The petitioner, in its answering brief, re-stated the issue as:

> Whether the trial court erred when it found that defendant's statement was attenuated from his illegal arrest. (Petitioner's brief in the Illinois Appellate Court, p. 5).

statement, Dorrough admitted his own involvement. In the process of doing so, Dorrough also implicated Walley and the respondent. Then, after Walley was confronted with the information the police had compiled from the first two arrestees, Walley confessed his involvement. At the end of the second round, after being confronted with all the information the police had accumulated up to that point, respondent still did not make a statement. Respondent finally made a statement at the end of the third round, after the police had obtained additional information from Dorrough and Walley. From the time respondent was initially arrested until he confessed, approximately five hours elapsed. (Appellate Court Opinion, Pages 1-4).

At the suppression hearing, Detective Fleming testified that all four men had voluntarily agreed to accompany him to the police station. (Supplemental Record, p. 16). The trial judge found that none of the four men had voluntarily accompanied Detective Fleming to the police station and the court granted respondent's motion to suppress. The petitioner then requested the court to hold an attenuation hearing. (Supplemental Record, p. 122).

During the course of the trial court proceedings, it was judicially determined that Dorrough, Walley and respondent were illegally arrested. (Appellate Court Opinion, Pages 3-4). The legality of Taylor's arrest was never judicially determined because Taylor was never charged with a criminal offense.

Supreme Court Rule 14 (g)(i) requires that The Statement of the Case section of the Petition for Writ of Certiorari shall describe the history of the presentation of the

federal question in the state courts. The petition does not comply with the Rule.

The Fourth Amendment question was first raised when respondent filled a pre-trial motion to quash his arrest and suppress his confession. After it was determined that the arrest violated respondent's Fourth Amendment rights, the prosecution requested an attenuation hearing. The trial judge specifically found that the statements of Taylor, Dorrough, and Walley "were an intervening circumstance sufficient to purge the taint of Austin's illegal arrest." (Record on Appeal, C87-88; Trial Court Order, Pages 18-19). The trial judge reasoned "The statement from Kevin Taylor was "untainted" and properly obtained. Taylor was never charged with any offense involving the murder of Rufus Simpson. Accordingly, this statement could be utilized to attenuate the illegality of [respondent's] arrest." (Record on Appeal, C83; Trial Court Order, Page 14).

In the appellate court, the petitioner adopted the same rationale as the trial judge had used to find attenuation. The petitioner urged that the intervening circumstances, the information the police had obtained and confronted respondent with, was untainted because it all stemmed from Taylor, and Taylor's arrest had never been judicially declared to be illegal. (Petitioner's brief in Illinois Appellate Court, Pages 20-22). The appellate court held that the petitioner had failed to prove that tainted evidence was not a factor in respondent's decision to confess and therefore the sanction of exclusion was required.

In its Petition for Leave to Appeal to the Illinois Supreme Court, the petitioner urged that there was a conflict in Illinois in regard to the question of whether the

prosecution could use tainted probable cause to attenuate an illegal arrest and that the line followed by the appellate court in this case was "rudimentarily flawed." (Petition for Leave to Appeal, Page 12). Also, the petitioner urged the Illinois Supreme Court to correct, what the petitioner claimed was, the appellate court's mistaken belief that the respondent had standing to assert his co-arrestees's constitutional rights. (Petition for Leave to Appeal, Pages 12-16).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The first Question Presented in the petition is:

> Whether a criminal defendant can object to the use of a statement of a co-arrestee, who is in custody without probable cause, to establish probable cause for the defendant's arrest or to establish that any taint of the illegality involved in the defendant's arrest was attenuated. (Petition, Page i).

(A) Certiorari should be denied because the decision below does not raise the Question Presented.

The question of whether a defendant can object to the police obtaining probable cause to detain him, from a co-arrestee, regardless of how obtained, has never been an issue in this case. Because a criminal defendant does not have standing to assert another person's constitutional right, it is settled that the police do not have to set a suspect free if the knowledge for his legal detention was the result of a violation of another's constitutional rights. See *Alderman v. United States*, 394 U.S. 165, 171-76, 89 S.Ct. 961, 965-68. In this case, respondent never claimed that his arrest at the police station should be quashed.

The second part of the Question Presented, whether a criminal defendant has standing to object to the prosecution's use of a co-arrestee's statement as an attenuating factor is not an issue in this case either. That is so because respondent never "objected" to the prosecution's use of the co-arrestees' statements against him. Those statements were available for the prosecution to use during the trial. In the state courts, it has been the petitioner who has been consistently attempting to keep the circumstances surrounding the acquisition of those statements out of the attenuation equation.

What the respondent did claim below is that for purposes of the exclusionary rule, the information the police gained from the co-arrestees was so infected with police misconduct, intertwined with the circumstances of respondent's own illegal arrest, and so instrumental in his eventual decision to confess, that it would thwart the goal of the exclusionary rule to attribute to that information the quality of an untainted independent intervening circumstance. The appellate court agreed.

The petitioner's Question Presented confounds the concept of standing with the concept of attenuation. Standing is necessary to claim a Fourth Amendment violation. Once that Fourth Amendment violation is found, as happened in this case, the violation affords the defendant whose own constitutional right was violated the privilege of invoking the exclusionary rule. See *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct 613. Attenuation analysis does not begin until a court has determined that a defendant's Fourth Amendment right was violated.

At page 10 of its petition, petitioner incorrectly characterizes the appellate court

decision as reasoning that the State could not use the statements of the co-arrestees as attenuating factors " . . . because those statements themselves were obtained in violation of the co-arrestees' Fourth Amendment rights." The question of whether the co-arrestee's constitutional rights were violated was never presented to the appellate court and the appellate court never considered that question. The appellate court actually held:

> " . . . Confronting defendants with statements from each other [,] * * * all of whom were legally [sic] arrested, did not constitute an intervening event which purged the taint of the illegal arrests." Avery, 180 Ill. App. 3d at 156. Under this analysis, the statements of Taylor, Dorrough, and Walley did not provide an intervening circumstance so as to purge the taint of defendant's arrest. (App. 10; 688 N.E.2d at 744).

For attenuation purposes, the appellate court reviewed all the facts to determine if the trial judge's finding that some untainted independent intervening event had occurred was supported by the record. The appellate court determined the trial court's finding was clearly erroneous. (See *People v Foskey (*1990), 127 Ill. 2d 66, 554 N.E.2d 192 holding that the trial court's ruling on a motion to suppress will not be disturbed unless clearly erroneous).

(B) Certiorari should be denied because the appellate court's holding does not conflict with the holding in *United States ex. rel Wright v. Culyer*, 563 F.2d 627 (3rd Cir. 1977). [2]

As explained in section (A), the appellate court did not hold that the exclusionary rule was appropriate in this case because the co-arrestee's Fourth Amendment rights were violated. Moreover, the language petitioner extracts from the *Wright* opinion to mark the supposed conflict is misleading because it is presented out of context.

The intervening probable cause at issue in *Wright* was the after acquired information the police obtained from a man named Cochran. The police gained that information while Wright was being illegally detained. The Court of Appeals made factual findings that "There is no evidence in the record that Cochran's arrest was either legal or illegal," and, "Wright was not informed of Cochran's statement and, therefore, that disclosure could not have influenced petitioner's decision to confess." *Wright, Id.* 563 F.2d at 631.

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[2] The Pennsylvania Supreme Court affirmed Wright's conviction in *Commonwealth v. Wright*, 460 Pa. 247, 332 A.2d 809 (1975). The subject of the Third Circuit opinion that petitioner cites is the denial of Wright's federal habeas corpus petition. The Third Circuit holding is consistent with the Pennsylvania Supreme Court's holding that Wright's confession was admissible, since it was not causally related to the invasion of the defendant's rights.

The Illinois Supreme Court has twice cited the analysis in *Commonwealth v. Wright* favorably and relied on it. See *People v. Gabbard* (1979) 78 Ill. 2d 88, 398 N.E.2d 574 and *People v. White* (1987), 117 Ill. 2d 194, 512 n.E.2d 677, cert. denied (1988), 485 U.S. 1006, 108 S.Ct. 1469.

The attenuation finding in *Wright* is based on the fact that the intervening probable cause was untainted and the information could not have possibly affected Wright's decision to confess. The language in the *Wright* opinion at 563 F.2d 631, stating, "Indeed, even if it were illegal [Cochran's arrest], petitioner would have no standing to raise the issue here," is directed to suggest that under the circumstances the only possible way Wright could benefit from what had happened to Cochran was if he possessed the standing to quash Cochran's arrest and to suppress Cochran's statement. That is so because whatever happened to Cochran, it had no causal connection to Wright's illegal arrest; moreover, since Wright was never confronted with Cochran's statement, whatever happened to Cochran obviously was unrelated to Wright's decision to confess.

II. The second Question Presented in the petition is:

> Whether, if the statement of an illegally arrested co-arrestee establishes probable cause for a criminal defendant's arrest completely independent of the defendant's initial arrest without probable cause, it is necessary for the prosecution, in order to avoid the imposition of the exclusionary rule, to establish attenuation between the defendant's initial illegal arrest and evidence recovered after probable cause has been established. (Petition, Page i)

(A) Certiorari should be denied because neither the decision below nor the record raises the Question Presented in the petition.

The essential factual predicate contained in petitioner's Question Presented is missing from this case. Whether or not the information the police used to confront respondent in order to persuade him to confess was "completely independent" is precisely the question the appellate court resolved against petitioner. If the information had been

"completely independent," as the Question Presented represents, undoubtedly the appellate court would have affirmed the trial court's attenuation ruling.

The information the police confronted respondent with was the product of the exact same police misconduct that resulted in respondent's initial detention. Moreover, the illegally seized information was the only thing that the police used to persuade the respondent to confess after approximately five-hours of interrogation. After examining the facts of this case, the appellate court determined that the trial judge's determination that the information obtained was "completely independent" was clearly erroneous.

Assuming arguendo that the information the police obtained from the co-arrestees had been "completely independent," that Question Presented (*i.e.*, whether an attenuation hearing should ever be held if probable cause exists) was never presented to the courts below. The appellate court did not decide that Question Presented because, until this petition, the petitioner had never claimed that an attenuation hearing was unnecessary. In fact, in the trial court the petitioner was the one who sought the attenuation hearing, after the trial court had ruled that respondent's Fourth Amendment rights were violated. By failing to object to the attenuation hearing in the trial court, the petitioner failed to preserve for review the principal it now urges in this Court. (See *People v. O'Neil* (1984), 104 Ill. 2d 399, 472 N.E.2d 441 holding the State was precluded from arguing ground in support of trial court's ruling where it relied on different ground at trial). Certiorari should be denied because petitioner's litigation posture with respect to the Question Presented has not been consistent. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105

S. Ct. 2427 91985), *Canton v. Harris* ,489 U.S. 378, 384, 109 S. Ct. 1197 (1988).

(B) Certiorari should be denied because the question of whether probable cause automatically precludes the sanction of exclusion was answered in *Taylor v. Alabama*, 457 U.S. 687 (1982).

The circumstances involved in *Taylor v. Alabama*, 457 U.S. 687, 102 S. Ct. 2664 (1982) parallel the circumstances of this case. As in *Taylor*, respondent was arrested without probable cause, transported to police headquarters, advised of his Miranda rights, and interrogated. As in *Taylor*, while respondent was being illegally detained and interrogated, the police obtained information which gave them probable cause to arrest him. As in *Taylor*, that information was intertwined with the police misconduct which brought about the initial illegal arrest. As in *Taylor*, respondent's confession was prompted by the police using the illegally obtained information to confront him. And, also as in *Taylor*, the only intervening circumstance that existed in the case was tainted because it flowed from the initial police misconduct

In this Court, one of the significant "intervening events" the State relied on to attenuate the violation of Taylor's Fourth Amendment right was the fact that before Taylor made a statement, an arrest warrant had been filed. The State urged that the intervening arrest warrant constituted an independent intervening event and severed any connection between the Fourth Amendment violation and the subsequent statement. This Court held "The filing of the warrant, however, is irrelevant to whether the confession was the fruit of the illegal arrest." *Taylor, Id.* 457 U.S. at 692.

Moreover, at Page 13 of its petition, the petitioner acknowledges that, even prior to

Taylor, in *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 417 (1963), this Court looked upon later acquired probable cause, not as per se severing event, but as one of the factors to be examined in attenuation analysis.

This Court has already recognized that the acquisition of probable cause by the police after the illegal arrest but before the suspect's voluntary statement neither logically breaks the causal chain between the two as a matter of course nor, in view of the purposes of the exclusionary rule, necessarily attenuates the relationship between the arrest and the confession to the point the evidence need not be excluded. Petitioner has not advanced any reason, either legal or pragmatic, why *Taylor* should be revisited.

(C) Certiorari should be denied because there is no conflict of State or Federal authority on the question of whether after acquired probable cause always cures a Fourth Amendment violation.

Petitioner represents that reviewing courts are divided on the question of whether after-acquired probable cause always forecloses exclusion of evidence seized in violation of the Fourth Amendment. It cites *Virgin Islands v. Gerau*, 502 F.2d 914 (3rd Cir. 1974), *United States ex rel. Wright v. Culyer*, 563 F.2d 627 (3rd Cir. 1977), *Townsley v. State*, 652 S.W.2d 791 (Tex. Ct. Crim. App. 19830 and *State v. Gifford*, 558 So.2d 444 (Fla. App. 1990), as decisions which " . . . treat the intervening probable cause as a "severing event," which totally breaks the causal connection between the illegality of the arrest and evidence later acquired from the suspect." (Petition, Page 12). Petitioner has misstated the breadth of the holdings in those cases.

That line of cases is factually distinguishable from this case, in a crucial way. In

every one of the cases the after acquired probable cause was independent from the Fourth Amendment violation and also untainted. Moreover, in every one of petitioner's cases the information did not affect the suspect's decision to confess because the suspect was never confronted with the information. In other words, probable cause was deemed to be a severing, or attenuating, event in the cited cases because the police received no benefit from their unlawful conduct. Thus, little was to be gained by imposing the sanction of exclusion.

In *Gerau*, while he was in custody as the result of an illegal arrest, an untainted warrant issued for Gerau's arrest prior to the confession. In *Wright*, while Mr. Wright was in custody as the result of an "assumed" illegal arrest, the police obtained independent probable cause to hold him. In *Townsley* "By way of contrast [to the facts in *Taylor v. Alabama*], none of the information used to establish probable cause in the instant case was the fruit of an illegal arrest." *Townsley v. State* 652 S.W.2d at 797. In *Gifford*, subsequent to the initial unlawful arrest, the police obtained untainted independent probable cause to legally detain and interrogate Mr. Gifford.

In order to approve the sanction of exclusion in the above cases, those courts would have had to adopt the "but for" test, which this Court rejected in *Wong Sun*. The sanction of exclusion in those cases would have imposed greater costs on law enforcement than can be justified by the rules' deterrence purposes. Other than giving the police access to the suspect, the misconduct had nothing to do with the confessions in those cases. The suspects would have received the windfall of exclusion when the police

conduct was in good faith, minor, and only tangentially related to the confession.

Although the appellate court reached a different result in this case, it used the same analysis as did the courts in *Gerau*, *Wright*, *Townsley*, and *Gifford*. Recognizing that the interrogation in this case was completely infected with seamless police misconduct from arrest to confession, the appellate court found that exclusion was a necessary sanction because the opposite result would provide the police with an incentive to repeat such misconduct. That ruling does not conflict with any other authority.

(D) Certiorari should be denied because the Court has historically refused to apply a bright line rule, running in either direction, to determine if the exclusionary rule should be applied after a Fourth Amendment violation.

In *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct 2254 (1975), the State also asked this Court to establish a bright line rule to sever the relationship between police misconduct and a subsequent statement. In *Brown*, it was the giving of Miranda warnings that the State urged should always constitute an intervening independent act to remove the taint of a prior Fourth Amendment violation. The Court rejected the *per se* rule that the Illinois Supreme Court had adopted in that case:

> The question whether a confession is the product of free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. *Brown v. Illinois*, Id. 422 U.S. at 603

In *New York v. Harris*, 495 U.S. 573, 110 S. Ct. 1640 (1989), although the Court

held that the constitutional violation was attenuated, nevertheless the Court again disavowed the concept that legal custody always trumps an attenuation inquiry. (See *New York v. Harris*, 495 U.S. (1989) 'We do not hold, as the dissent suggests, that a statement taken by the police while a suspect is in custody is always admissible as long as the suspect is in legal custody.")

In *United States v. Cherry*, 759 F.2d 1196, (5th Cir. 1985), relying on this Court's language in *Brown*, the Court of Appeals rejected the same argument that petitioner is advancing in this case. That court held that the intervening advent of probable cause was not by itself sufficient to render a defendant's consent free from taint. (See *United States v. Cherry*, Id. 759 F.2d at 1212, stating "The intervening discovery of probable cause to support a suspect's detention, by itself, "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." *Brown v. Illinois*, 422 U.S. at 603, 95 S.Ct. at 2261.")

(E) Certiorari should be denied because rejection of the attenuation analysis that was used by the appellate court will undermine the purpose of the exclusionary rule.

The basic purpose of the exclusionary rule is to remove possible motivations for illegal arrests. "The rule is calculated to prevent, not to repair. Its purpose is to deter and to compel respect for the constitutional guaranty in the only effectively available way and by removing the incentive to disregard it." *Brown, Id.*, 422 U.S. at 599-600 quoting *Elkins v. United States* 364 U.S. 206, 217 (1960). As the Court announced in *Brown, Id.*,

422 U.S at 602, "*Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment."

If after acquired probable cause, by itself, is held to attenuate the taint of an unconstitutional arrest in every case, regardless of how that information is acquired by the police, the exclusionary rule could not serve its purpose. Illegal arrests and prolonged detention would be encouraged by the knowledge that the eventual discovery of probable cause is waiting in the wings, and if found, it will serve as the cure all for the preceding police misconduct.

This case presents a compelling example of why a bright line rule would eviscerate the exclusionary rule in cases like this one. The police misconduct at issue, the illegal arrests of the four men in front of the Walley residence, did not merely provide the initial contact between the police and respondent. That exact same police misconduct is also the source of the cure that the petitioner is prescribing. But for the police misconduct in this case there would have been no intervening probable cause. But for the police misconduct in this case, the police would have had no information to use to confront respondent with to persuade him to give up his silence. Adoption of a bright line rule that absolutely forecloses judicial examination of such conduct will not prevent misconduct, rather, it will encourage unconstitutional dragnet arrests.

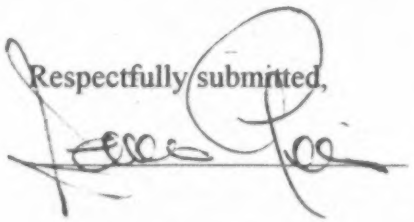
On the other hand, the law currently in effect does not handicap lawful police work. In this case, if the circumstances surrounding the acquisition of the information the police used to confront respondent with had been obtained independent of police

misconduct, then it would have served to attenuate the violation of respondent's Fourth Amendment rights.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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